Supreme Court, U.S.
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No. 95-1316

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SOLVENTES Y QUIMICA DE NICARAGUA, S.A. SOLQUIMISA; TRANSMERQUIM DE MEXICO, S.A. DE C.V.; TRANSQUIMICA, S.A. DE C.V.; TRANSMERIDIAN GUATEMALA, S.A.; TRANSMERIDIAN EL SALVADOR, S.A. DE .C.V.; TRANSMERQUIM DE COSTA RICA, S.A.; and QUIMICA FLAMINGO, S.A.; AND TRANSQUIMICA S.A. DEC. V.
Petitioners,

v.

JOHN W. WEAVER, LIQUIDATING TRUSTEE
Respondent

On Petition for a Writ of
Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issues presented by the Petition, as restated, are as follows:

1. Whether each Defendant's extensive and persistent contacts with the State of Texas and the United States, including entering into contracts performable in Texas and governed by Texas law; taking delivery of the contracts' subject matter in Texas; employing agents and officers in Texas; and engaging in larger scale, systematic business relationships with an affiliated corporation whose sole place of business is in Texas, compels the conclusion that the United States Bankruptcy Court of the Southern District of Texas can exercise *in personam* jurisdiction over each of the Defendants?

2. Whether the United States Bankruptcy Court of the Southern District of Texas' assertion of personal jurisdiction, under the facts presented, satisfies the United States Constitutional requirements of due process and traditional notions of fair play and substantial justice?

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STATEMENT OF THE CASE

The Respondent concurs with the Petitioners' statements as to the Proceedings Below.

THE FACTS

The Latin American Affiliates

Trans Marketing Houston, Inc. ("TMHI") was formed in 1983. All of its stock is owned by Frans G. J. Speets ("Speets") and Richard C. Kellogg, Jr. ("Kellogg") of Houston, Texas. (Tr. 655) TMHI filed for bankruptcy relief under Chapter 11 in April of 1993. The Official Creditors' Committee proposed a liquidating Chapter 11 Plan which was confirmed by the Bankruptcy Court in early 1994. John W. Weaver (hereinafter "Trustee") was appointed Trustee under that Plan. He brought this case seeking turnover of funds or collection of accounts from each of the seven Defendants.

TMHI sold chemicals in eight Central and South American countries (i.e., Mexico, Guatemala, El Salvador, Honduras, Costa Rica, Nicaragua, Columbia and Venezuela) through what were consistently referred to as the "affiliates" or "our Central and South American distribution companies." (See direct examination of Frans G. J. Speets given in Bankruptcy Court April 22, 1993 in the main case, hereinafter referred to as the "Speets Testimony," at Tr. 502-501). Seven of those eight affiliates are Defendants in this adversary proceeding and are referred to in the Complaint and in this Brief as the "Latin American Affiliates" or "Affiliates." Speets and/or Kellogg were officers and directors of each of the Latin American Affiliates. (See Speets Testimony at Tr. 501). These companies have consistently been held out as distribution vehicles of TMHI.

(See affidavit of John W. Weaver, hereinafter referred to as the "Weaver Affidavit," Exhibit A Tr. 465).

The Latin American Affiliates were all set up and funded in the same fashion. TMHI purchased chemicals on credit; usually took delivery of the chemicals in Texas; and then sold and delivered those chemicals to the Affiliates on extended 180 day open payment terms. (Speets Testimony at Tr. 505). TMHI would refinance that credit by bank borrowings since the payment terms being given the Affiliates by TMHI were significantly more favorable than those being given TMHI by its suppliers. (Speets Testimony, Id.). As a result of these transactions, approximately $6.285 million was owed to TMHI by the Latin American Affiliates at the time of bankruptcy out of approximately $12.3 million in total receivables. (Speets Testimony at Tr. 506). In other words, debt owed by the these defendant Affiliates constituted approximately one-half of the total accounts receivable of TMHI at the time the bankruptcy was filed.

TMHI lost its bank financing when the bankruptcy case was filed. This meant that it could not continue to give extended terms to its Latin American Affiliates and still pay its suppliers. (Speets Testimony at Tr. 505). Nonetheless, it was estimated that about half of the $6.3 million which was owed by the Affiliates could be collected within 60 days. (Speets Testimony at Tr. 503). This was in part due to the fact that Speets and Kellogg were officers of the various Latin American Affiliates (Speets Testimony at Tr. 501). Indeed, Kellogg and Carlos Rodriguez ("Rodriguez") met in Houston with Banque Paribas in June 1993 on behalf of the five companies located in Central America and Mexico to negotiate terms of repayment. (See Affidavit of Marian E. Livingston attached as Exhibit 1 to Plaintiff's Response to Defendants' Plea to the Jurisdiction, hereinafter "Livingston

Affidavit," at TR. 208). Kellogg's subsequent correspondence acknowledged Rodriguez's authority as representative of what continued to be called the "Mexican and Central American Distribution Affiliates." (See Exhibit A to Livingston Affidavit at Tr. 205). Rodriguez has, incidentally, consistently been shown as a manager or officer of one or more of the Central American companies in information distributed to the public. (See Weaver Affidavit, Exhibits A and B at Tr. 460 and 449).

Speets or Kellogg hold majority ownership and control of each of the Latin American Affiliates by reason of the fact that one or the other owns at least 60% of the stock in each company or that the two of them together own 95% of the stock of TMH (Trans Marketing Houston) N.V. which in turn owns the controlling stock in the Affiliates. (See Livingston Affidavit at Tr. 207-206 and Weaver Affidavit, Exhibits C-1, C-2 and C-3 at Tr. 419).

Specific Transactions with Individual Defendants

Each of the individual Affiliates has engaged in a persistent and systematic course of conduct of entering into contracts by telex or mail with TMHI in Houston for the purchase of chemicals on credit and the arranging for their shipment; taking delivery of such chemicals in Houston or at various other points in the United States; contracting to pay the amounts owed in the United States for the benefit of a bank in Houston; and, in at least two cases, holding bank accounts in the United States.

Attached to the Weaver Affidavit as Exhibit N at Tr. 280 is a summary statement of the open contracts with the Latin American Affiliates as of July 21, 1993. See Resp. Br.

App. A. Several bear invoice dates of April 15, 1993, i.e., the day before the voluntary bankruptcy filing.

Connections with Banque Paribas Houston Agency

In December, 1992, TMHI entered into a renegotiation of its banking relationship with Banque Paribas Houston Agency. As a result of these negotiations, TMHI executed various loan agreements and other documents. Significantly, Speets, Kellogg and TMH (Trans Marketing Houston) N.V. guaranteed TMHI's debt to Banque Paribas. Moreover, each pledged its stock in the Latin American Affiliates as security for guaranties of TMHI's debt to Banque Paribas. (See Weaver Affidavit, Exhibits C-1, C-2 and C-3 at Tr. 419). Thus, the controlling stock ownership of all of the Latin American Affiliates is not only directly or indirectly owned by two U. S. residents--Speets and Kellogg--but that stock is actually held by a bank in Houston as security for loans to TMHI.

The Panachem Relationship

The Latin American Affiliates were unable to use TMHI for the acquisition of chemicals following its bankruptcy. To solve this problem, those Affiliates entered into an exclusive agency relationship with a United States entity based in Houston called Pan American Chemical Marketing, Ltd. ("Panachem").

The Latin American Affiliates have "created and financed" an entity to continue to represent them in the United States and that agent has its principal office in Houston, Texas.

Relationship of TMHI and the Latin American Affiliates

As acknowledged by Speets, either he or Kellogg hold management positions with each of the Latin American Affiliates. Indeed, the Latin American Affiliates have been held out to the industry for a number of years as mere instrumentalities or distribution arms. (See Weaver Affidavit, Exhibits A and B at Tr. 460 and 449). Substantial purchasing decisions were influenced or directed from Houston. (See Weaver Affidavit at Tr. 462). The money sought to be turned over in this lawsuit represents the capitalization of the Latin American Affiliates which was supplied by TMHI as a result of credit purchases from persons who are still owed money in TMHI's bankruptcy. The Speets Testimony makes clear that the Latin American Affiliates could not have existed without the extension of credit from TMHI. Indeed, they continue to exist and operate by reason of not having repaid their just debts to TMHI. This intimate relationship was acknowledged by Speets and Kellogg when they pledged their stock in the Latin American Affiliates to secure TMHI's credit facility from Banque Paribas. In short, the Latin American Affiliates are separate or foreign corporations in name only--they are actually no more than the instrumentalities or alter egos of TMHI and Speets and Kellogg.

REASONS FOR DENYING WRIT

I. Bankruptcy Rule 7004(d) is Not in Controversy in this Case as Jurisdiction can be maintained under other State and Federal Statutes.

The central issue presented by this Petition for Writ of Certiorari is personal jurisdiction over the Defendants.

The Petitioners have characterized this dispute as one that involves the application of Bankruptcy Rule 7004(d) in order to create a novel controversy worthy of this Court's attention. In fact, this case neither directly implicates Bankruptcy Rule 7004(d) nor is review of Bankruptcy Rule 7004(d) necessary to resolve the issues presented by this case. The Petition should be denied.

Bankruptcy Rule 7004 governs the service of process in adversary proceedings. It is the Bankruptcy Court's equivalent of Rule 4 Fed. R. Civ. Proc. Bankruptcy Rule 7004(d) allows service of process anywhere in the United States. Since the Petitioners are defendants residing in foreign jurisdictions outside of the United States, Bankruptcy Rule 7004(d) is clearly inapplicable to this case. Bankruptcy Rule 7004(e)(C) governs service in a foreign country. It provides that service can be made using the methods described in Fed. R. Civ. P. 4(c)(2)(C)(i) or (e). Fed. R. Civ. P. 4(e) allows service "under the circumstances and in the manner prescribed in the statute or rule" of the state in which the district court sits. Thus, this case involves the analysis and application of the Texas Long Arm Statute Tex. Civ. Pract. Rem. Code 17.042 rather than Bankruptcy Rule 7004(d). The case law has clearly defined the reach of the Texas Long Arm Statute and the facts of the case at hand fall squarely within these limits. Review by the United States Supreme Court will neither resolve a conflict among courts of appeal nor clarify the current case law.

The Petitioners incorrectly assert that there is confusion or conflict among the circuits on the subject of long-arm jurisdiction in a case such as presented here. Courts have reached different results in individual cases in deciding whether or not *in personam* jurisdiction has been established in a particular case. These differing results do

not, however, flow from different or competing legal principals. *In personam* jurisdiction is essentially a fact driven inquiry based upon well established constitutional and procedural principals of law. The Petitioners, in this case, are simply seeking a review of the fact findings made by the lower courts that those legal principals support *in personam* jurisdiction in this particular case.

II. Jurisdiction can be maintained under Texas Long Arm Statute.

In cases where a court is attempting to exercise extra territorial jurisdiction over a defendant under a state long arm statute, the inquiry is whether the defendant has had minimum contacts with the forum. International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 315, 66 S.Ct 154, 158, 90 L.Ed. 95 (1945). Applying this analysis to the facts in the instant case, it becomes clear that the requirements for *in personam* jurisdiction imposed under either federal law or under the Texas Long Arm Statute have been met. Since jurisdiction can be imposed under both state and federal law, review of Bankruptcy Rule 7004(d) is not a genuine controversy in this case and the Petition should be denied.

A federal court when attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process must consider the defendant's contacts with the United States as a whole rather than just with the forum in its minimum contacts analysis. Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255 (5th Circuit 1994); Fitzsimmons v. Barton, 589 F.2d 330 (7th Circuit 1979). The Bankruptcy Code is such a federal statute and nationwide service on a foreign defendant is countenanced by Bankruptcy Rule 7004.

In re Chase & Sanborn Corp. v. Granfinanciera, S.A., 835 F.2d 1341, 1344 (11th Cir. 1988), reversed on other grounds as rev'd on other grounds sub.nom., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

Courts have also applied the United States aggregate contacts test in their jurisdictional inquiry when applying a state long arm statute pursuant to Bankruptcy Rule 7004(e). In re Ace Pecan Co., Inc., 143 B.R. 696 (Bankr. N.D. Ill. 1992); Highway Equipment Co. v. Alexander Howden, Ltd., 120 B.R. 910 (Bankr. S.D. Ohio 1990). The Trial Court properly considered all of the Defendants' contacts with the United States in its finding of jurisdiction. Regardless of whether the court considered the Defendants' contact with just Texas or with the United States as a whole, however, the Defendants' contact with the forum state was sufficient to satisfy either test and justify the imposition of jurisdiction under the Texas Long Arm Statute. In fact, service in accordance with the Texas Long Arm Statute has been made subsequent to this Appeal.

Contact with the Forum

As noted by the Court in International Shoe, supra, the first touchstone for jurisdiction is the defendant's voluntary contact with the forum. In this case, each of the Affiliates have systematically entered into contracts with TMHI in Houston, Texas. The course of dealing with some of the Affiliates goes back almost nine years. TMHI and the Defendants were engaged in a common enterprise. Speets and Kellogg controlled and directed all of the companies, in one form or another, from Houston. (Weaver Affidavit, p. 5) (T.R. 465) Chemicals were sold by TMHI to each of its

Affiliates who, in turn, sold the chemicals to customers in the individual Central and South American countries.

The contracts between TMHI and the Affiliates were consistently performable by the delivery of United States products in the United States (usually Texas) for the benefit of the Affiliate who was obligated to pay in the United States for the goods so delivered. The contracts consistently provided that the law of the State of Texas would govern. All of the Defendants are directly or indirectly majority owned by Texas residents. Six of the seven Defendants voluntarily consented to the pledge of the majority of their shares to a Texas bank in order to secure an obligation of a Texas debtor, i.e., TMHI. Each of the Defendants has at least one officer and director, i.e. Speets or Kellogg, who resides in Houston. Two of the Defendants maintain bank accounts in the United States and one of those accounts is in Houston. The Defendants have continued to do business in the United States since TMHI's bankruptcy and have, in fact, set up and employed an exclusive agent to act on their behalf from its office in Houston, Texas.

The Affiliates are Not Mere Passive Purchasers

The contracts between TMHI and the individual Latin American Affiliates are a sufficient basis for jurisdiction. The Texas Long Arm Statute provides that: "a non resident does business in this state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or part in [Texas]." Tex. Civ. Prac. Rem. Code Ann. § 17.042 (Vernon 1987). The statute has passed federal constitutional scrutiny and has been held to reach as far as federal requirements of due process under the U.S. constitution will allow. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974).

The Petitioners have portrayed the Affiliates in their dealings with TMHI as mere passive purchasers and have asserted that this status exempts them from jurisdiction. Neither of these assertions are correct.

The Petitioners imply that the fact that the Affiliates were the buyers rather than the sellers somehow alleviates the need for further jurisdictional inquiry. They cite Rosenberg Bros. & Co. v. Curtis Brown Co., Inc., 260 U.S. 516 (1923) as "the seminal case concerning the jurisdictional exclusion for purchases." Petition for Writ of Certiorari, P. 7. The purchaser distinction in that holding, however, is limited to the assertion of *general* jurisdiction over a defendant. The United States Supreme Court in Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S.Ct. 1868, 1874 (1984) specifically refrained from indorsing the Rosenberg holding to matters involving *specific* jurisdiction. "In accordance with Rosenberg, we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."[emphasis added]. Courts have commented in reference to the holding in Rosenberg that the "United States Supreme Court...has advanced beyond the presence theory underlying that case" and that Rosenberg is "obsolete" in specific jurisdiction analysis. Henry R. Jahn and Son, Inc. v. Superior Court of San Mateo County, 323 P.2d 437, 439 (Cal. 1958). The transactions which supply the contacts with the forum necessary to sustain jurisdiction are the very subject of this suit. Rosenberg's purchaser distinction is inapplicable to the facts of this case.

Moreover, the Affiliates' contact with Texas goes far beyond a mere purchaser and the Petitioners' "mail order

analogy" is outside the facts of this case. The District Court found, "the appellants' contention that they were merely a purchaser of goods ... unpersuasive. The evidence demonstrates that the activities of the parties in this case evolved primarily in Texas." See Pet. Br. App. C at 11a. The Affiliates recruited Texas residents as officers of the corporation. See Pet. Br. App. C at 11a-12a. Courts have long held that whether or not a Defendant recruits residents from the forum as employees is a relevant factor to jurisdictional analysis. International Shoe, 326 U.S. at 314. Speets and Kellogg made executive decisions in their roles as officers and directors of Affiliates from within the forum. The stock of the Affiliates was pledged to a Texas bank. The Affiliates were involved in a common business enterprise with a Texas corporation, TMHI. The place of performance of the contracts which are the subject of this suit is Texas.

Courts have consistently looked to the place of contractual performance to determine whether the making of a contract with a Texas resident is sufficiently purposeful to satisfy minimum contacts. Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1068 (5th Cir. 1992); Product Promotions, 495 F.2d at 497; Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852-853 (5th Cir. 1966); See McGee v. International Insurance Co., 355 U.S. 220, 223 (1957) (The United States Supreme Court found that an insurance contract formed through the mails had enough connection with the forum to sustain personal jurisdiction).

In Product Promotions, the court was faced with a defendant foreign corporation whose only contact with Texas was the delivery of reports and film to Houston on activity (that was the subject of the contract) which took place out of the state. The contract was formed through the mails

between a Texas resident and a French corporation. The Defendant had no business, advertising, bank accounts, or representatives in the state. Product Promotions, 495 F.2d at 495. It did not solicit business in Texas and, in fact, the plaintiff initiated the contract which was the subject of the suit in France. Product Promotions, 495 F.2d at 495. It never had any physical presence in the state of Texas. Product Promotions, 495 F.2d at 495. The court nonetheless found personal jurisdiction over the corporation based on the fact that a part of contractual performance took place in Texas:

> [The defendant] entered into a contract that required some performance in Texas; that it did not contemplate breaching its own obligations does not make it unreasonable to foresee that those obligations might be tested in Texas... In short, [the defendant] voluntarily entered into a transaction with one it knew to be a Texas resident, a transaction which had a substantial connection with Texas and which [the defendant] had reason to know could have consequences in Texas.

Product Promotions, 495 F.2d at 497.

TMHI was a Texas corporation. See Pet. Br. App. C at 11a-12a. Each Affiliate entered into numerous contracts in which the place of contractual performance was in Texas. See Pet. Br. App. C at 11a-12a. The documents that evidenced these transactions were in Texas. TMHI stored its chemicals in Texas. See Pet. Br. App. C at 11a. The chemicals were delivered in Texas. See Pet. Br. App. C at 11a. The contracts provided that Texas law governed the contracts. Defendants' choice of Texas law to govern its

contracts with the Debtor is in itself not conclusive, but is certainly relevant in determining whether Defendants have purposefully invoked the benefits and protection of Texas law. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). These facts go well beyond those in Product Promotions. It can hardly be said that the Affiliates could not foresee being brought into a Texas court for debts not paid which arose from these contracts.

The Petitioners argue that the terms of the sales contracts between TMHI and the Defendants, such as place of delivery, choice of law, risk of loss, transfer of title, and place of payment, should not be considered in the Courts determination of "purposeful availment of the laws of Texas" because of what they allege is a lack of evidence to demonstrate whether or not these provisions were bargained for by the Defendants. They argue that since these provisions benefited TMHI, it was unlikely that any Defendant participated in the decision making process for the inclusion of these provisions in the contracts and inclusion of these provisions merely represents unilateral activity on the part of TMHI. This argument misconstrues "purposeful availment of the law" to require that a particular provision of a contract be requested or even desired by the Defendant to serve as basis to establish minimum contacts.

A purposeful availment inquiry focuses on contact of the Defendant with the forum so as to determine if it is fair for this defendant to be hailed into the courts of that jurisdiction to answer a lawsuit. Product Promotions, 495 F.2d at 494. There is no dispute that the Defendants chose to enter into numerous contracts with TMHI that had a Texas choice of law provision, that required the Defendants to make payment in Texas, and that required the Defendants to accept

delivery in Texas. These activities are not unilateral because each provision required action on the part of the Defendant in either agreeing to the terms of the contract (i.e. choice of law provision) or complying with their requirements (i.e. accepting delivery in the jurisdiction). The buyers acquiesced in all of the terms and conditions of these contracts on many occasions over a number of years.

There is no authority cited for the proposition that each individual provision of a contract must be desired by or beneficial to a defendant in order for that defendant to have purposely availed itself of the benefits of the forum. The uncontroverted evidence is that each of these buyers wanted the products which TMHI had to sell; those products were located in the United States; and TMHI was willing to sell them on more favorable credit terms than other sellers (including those from whom TMHI had to buy the products). Under those circumstances, the District Court was certainly justified in holding that all of the terms bearing upon the issue of the permissible exercise of jurisdiction were accepted by the Defendants over a long period of time in what was perceived to be a mutually beneficial relationship.

The Petitioners also argue that, since their contacts with Texas were made at the direction of Speets and Kellogg, they cannot be considered action of the Defendants. As made clear by the Speets Testimony, Speets and Kellogg were officers and directors of the Defendants. The fact that they held similar roles with TMHI does not in any way vitiate their decisions on behalf of the Defendants to voluntarily engage in extremely beneficial purchases of goods in Texas. To the contrary, the relationship of Speets and Kellogg to these Defendants establishes yet another jurisdictional contact with the forum state. Individual officers and directors of the Defendants were residents of Texas.

Their actions on behalf of the Defendants would be imputed to those Defendants for whom they acted, rather than to TMHI.

The Petitioners also argue that the corporate veil must be pierced before any action of Speets and Kellogg can be imputed to the Defendants in establishing the minimum contacts. They recite the rule of law announced in Lakota Girl Scouts C., Inc. v. Havey Fundrais. Man., Inc., 519 F.2d 634 (8th Cir. 1975) which held that a stockholder's ownership interest in a corporation with a presence in the forum cannot be considered contact by that stockholder with the forum without a piercing of the corporate form. As noted above, Speets and Kellogg are more than just stockholders. They serve as officers and, as officers, they are employees of the Defendants. Courts have long held that whether or not a Defendant employs residents of the forum as employees is a relevant factor in jurisdictional analysis. International Shoe, 326 U.S. at 314. Moreover, Speets and Kellogg made executive decisions within the forum in their roles as officers and directors of Defendants. Their actions as employees of the Defendant corporations are properly considered action by those corporations. Lakota is inapplicable to these facts.

The Petitioners assert that this case is factually similar to Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983). In Hydrokinetics, the court found that a Texas plaintiff failed to establish an Alaskan Defendant's purposeful availment of the law of the forum when the defendant agreed to purchase goods from a Texas manufacturer, payment for these goods was to be made in Texas, and, before any written agreement was executed, extensive communication occurred between the parties originating in Texas and Alaska. The plaintiff in Hydrokinetics argued that these activities were within the

facts of Product Promotions and established the requisite contact of the Defendant with the forum for personal jurisdiction.

The Hydrokinetics Court found that these actions did not constitute minimum contacts, distinguishing Product Promotions on the basis (1) that the Hydrokinetics contract provided that the law of the Defendant's state would govern the contract (2) that the case involved a single contract rather than a repeated series of transactions and (3) that in Product Promotions "an integral, essential portion of . . . performance, delivery of the [subject of the contract], took place in [the forum]" while that was not true in the Hydrokinetics sale. Hydrokinetics, 700 F.2d at 1030.

Every factor that the Hydrokinetics court found important in holding a lack of jurisdiction points towards establishing jurisdiction in this case. The sales contracts between TMHI and the Defendants provided that Texas law would govern. The Defendants had dozens of contacts with Texas rather than a single transaction. Both payment for and delivery of goods took place in Texas. Moreover, many other contacts are present in this case that were not found in Hydrokinetics. The Defendants employed Texas residents. The Defendants are controlled by Texas residents. The Defendants were involved in a long term interdependent relationship with a Texas corporation and Defendants continue to solicit business in Texas through Panachem. The Hydrokinetics case fails to support the Defendants' position since it is factually distinguishable from the instant case in every significant regard.

The Petitioners also cite Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985) for the argument that the Defendants' contact with Texas in this case does not amount to purposeful

availment of the law. The facts in Stuart do not go as far as those present in this case. Stuart, like Hydrokinetics, involved a single transaction with the forum and did not involve a repeated series of contracts over many years as between TMHI and the Affiliates. The contract in Stuart did not provide for delivery of goods in the forum. The shipment of articles referred to in Stuart involved the mailing of sample goods to the manufacturer for modification and testing. This action was viewed by the court as part of the negotiation of the contract rather than the ultimate delivery of goods which would constitute a satisfaction of the sellers contractual performance. Stuart, 772 F.2d at 1193. Stuart also did not have a choice of law provision in the contract which specifically stated that Texas law would govern. The defendant in Stuart did not recruit employees from Texas and did not continue to solicit business in the jurisdiction. None of the Latin American Affiliates in this case were passive purchasers with no "continuing course of conduct between the parties." L & P Converters, Inc. v. H.M.S. Direct Mail Service, Inc., 634 F.Supp 365 (D.Mass. 1986). The contacts in Stuart are factually dissimilar from this case and the decision is inapplicable.

Any rule of law which prevents Texas residents from using Texas courts to enforce contracts with foreign defendants where the contractual place of performance is in Texas would chill international commerce. Texas corporations would be unwilling to extend credit to foreign purchasers for fear of having to litigate in a foreign jurisdiction to collect debts. The Petitioners' argument seriously affects the constitutionality recognized interest of the forum in protecting its citizens from Defendants who breech their contracts. See Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 115 (1987); McGee, 355 U.S. at 223-224.

The longstanding business relationship of the parties is another basis of jurisdiction. In Burger King, the court found that the relationship created by a franchise agreement subjected the franchisee to the forum state of the franchisor because the defendant:

> reach[ed] out beyond one state and creat[ed] continuing relationships and obligations with citizens of another state [and is] subject to regulation and sanctions in the other state for the consequence of [his] activities.

Burger King, 471 U.S. at 472.

The relationship here between the parties is similar to the continuing relationship in Burger King. The Affiliates depended on TMHI to sell them U.S. chemicals and to extend favorable credit terms which would not be available with an arms length supplier. TMHI depended on the Affiliates to resell goods to various South American countries and pay TMHI the purchase price. More than half of TMHI's entire receivables are owed by the Affiliates. The Affiliates had continuing obligations to TMHI and Texas in the form of long term credit extensions. Each Affiliate has entered into a large number of transactions with TMHI as part of an ongoing relationship. Indeed, the Speets Testimony makes clear that the Latin American Affiliates could not have existed without the extension of credit from TMHI. The intimate relationship between the Affiliates and TMHI was acknowledged by Speets and Kellogg when the Affiliates' stock was pledged to Banque Paribas in order to secure TMHI's credit facility.

It has already been noted that the contracts contained a Texas choice of law provision. Indeed, that choice of law

provision brought with it the substantial protection afforded to purchasers by Texas law. This factor, as well as the much greater physical connection between the Affiliates and TMHI, was significant to the court in Burger King in sustaining *in personam* jurisdiction. In short, the relationship between TMHI and the Affiliates gave the Affiliates substantial connections with the State of Texas. Those connections brought with them the obvious foreseeability of exposure to litigation in Texas courts and serve to provide minimum contacts necessary for personal jurisdiction.

III. The exercise of personal jurisdiction on the Defendants by the United States Bankruptcy Court for the Southern District of Texas clearly satisfied Constitutional due process requirements and traditional notions of fair play and substantial justice.

The Petitioners assert that even if minimum contacts are established, the exercise of jurisdiction on the Affiliates will offend traditional notions of fair play and substantial justice as defined in the Asahi fundamental fairness test. Asahi 480 U.S. at 112. There is no basis to contend that the burden on these Defendants of litigation in the United States is so disproportionate that the Court should not entertain jurisdiction under the Asahi fairness test. In the first place, there is no showing at this stage that there is any serious factual dispute on the merits of this litigation other than the wish of the Petitioners not to be sued in the United States. Moreover, it is well recognized that modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

A representative of five of the Affiliates, Mr. Rodriguez, has travelled to Houston on at least one occasion to negotiate with Banque Paribas over the subject matter of this lawsuit. (See Livingston Affiliate at p.2, Tr. 207) The Affiliates each have officers and directors - Speets and Kellogg - who reside in Houston. Defending a lawsuit in this jurisdiction can be no more burdensome than performing other corporate responsibilities in the operation of the business of each defendant which has had a long and continuous relationship to Texas. These officers are also the majority stockholders of the corporations and have the singular authority to make any legal decision in the defense of this case.

The Defendants are dependant on chemical suppliers located in the United States. They have systematically and continuously engaged in hundreds of transaction in the United States and have property flowing in and out of the country. They continue to solicit business in this country. As acknowledged by the Petitioners in their brief in the Court of Appeals, the Trustee has already seized 1500 Tons of caustic soda from one of the Defendants in this jurisdiction during the pendency of this appeal.

It cannot be said that it is unduly burdensome for the Affiliates to defend a suit here. If anything, this is the most convenient jurisdiction for all of the parties to defend a suit. The only reason the Affiliates are resisting jurisdiction is in hope that the hardship of litigation in seven separate foreign jurisdictions will end the collection efforts of the Trustee.

The Forum's Interest in Adjudicating the Dispute

No forum has a greater interest in adjudicating this dispute than the United States District Court for the Southern

District of Texas. The bankruptcy of one of the parties is pending there. Virtually all of the creditors are United States residents and a large number reside or operate in the Southern District of Texas. The law of Texas, by agreement, will govern any dispute. The goods giving rise to the debt were made and delivered in the United States of America and a large number of those deliveries were at the Port of Houston. The majority of the stock of each Affiliate is pledged to a bank located in the Southern District of Texas. The Debtor's records pertaining to its transactions with Affiliates giving rise to this case are located in this forum. Efficiency and judicial economy make this the most appropriate forum for the adjudication of these claims. Appellee's alternative would be to prosecute this action in seven different and distant locales which might be unwilling or unable to apply the law that the parties have chosen, i.e., that of the State of Texas. The most convenient and effective place to resolve these disputes is the District in which the seller contracted with the Defendants for the delivery of the goods and in which the seller is in bankruptcy proceedings--the Southern District of Texas. Jurisdiction can be maintained under the Texas Long Arm Statute.

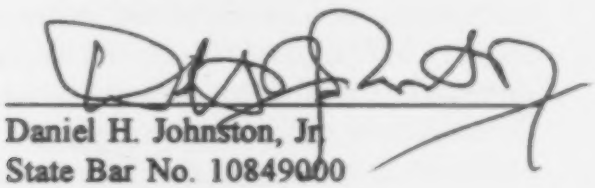
CONCLUSION

Each of the Defendants has extensive and systematic contacts with the State of Texas and the United States of America. Those contacts are sufficient to establish *in personam* jurisdiction over each Defendant under the Texas Long Arm Statute. As such, review of Bankruptcy Rule 7004(d) by the United States Supreme Court is not necessary and the Petition for Writ of Certiorari should be denied.

WHEREFORE PREMISES CONSIDERED John W. Weaver, Liquidating Trustee prays that this Court deny the

Petition for Writ of Certiorari and that he have such other and further relief to which he may show himself to be justly entitled.

Respectfully submitted,



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